



Concurrences

ANTITRUST PUBLICATIONS & EVENTS

Competition Law, Climate Change & Environmental Sustainability

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Foreword by Frans Timmermans

Introduction by Suzanne Kingston

COMPETITION LAW, CLIMATE CHANGE & ENVIRONMENTAL SUSTAINABILITY

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Foreword

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Humanity is going through one of the most transformational periods in history. We are battling a pandemic while also faced with the consequences of a digital industrial revolution as well as the existential threats posed by the climate and biodiversity crises.

In late 2019, the European Commission presented the Green Deal to enable Europe to become the first climate-neutral continent. We did so knowing that we needed to switch to a new, sustainable economic model. With the pandemic, the Green Deal has also become our roadmap to recovery.

Coming out of the Covid-crisis, the European recovery package and new multiyear budget enable governments across the European Union to invest massively in their recovery. 30% of these funds should go to climate policy, 20% to supporting the digital transition. And none of it can do significant harm to our planet.

In spending all this money we would be relegating our duty if we spent it on restoring parts of the economy that have no future. We are already placing a heavy debt on the shoulders of our children and grandchildren, and we have to avoid creating locked-in assets. The moment we are in requires us to save jobs not for years but for decades to come.

We are still in the early days of this historical change. Making this transformation a success means managing the transition. Predictability and long-term stability are key. Several elements in the Green Deal, including our Climate Law, help us anchor our commitment and provide the required clarity. We also need rules on competition and state aid that are adapted to the new realities. Public funds should act as a catalyst for private investment. Interest in sustainable investments is growing already, and our competition policy can help facilitate it further.

Time is ticking, but the work is happening as well. The changes needed to put Europe firmly on track to climate neutrality will take shape in the years to come. So while there still is plenty of doom on our horizon, we also have reason for hope. And – to paraphrase Thomas Jefferson – we can continue to find inspiration in the dream of the future rather than the history of the past.

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Introduction

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Should competition law prohibit competitors from agreeing to produce more energy-efficient goods, where this means higher prices for consumers? Is a dominant undertaking that switches to using only pricier recyclable packaging abusing its dominant position? Can the fact that a merger may lead to lower carbon emissions from production in the long-term be taken into account by competition authorities? Should state aid to coal-fired power plants be permitted?

Such questions typify the vigorous ongoing debate on the proper role of environmental considerations in contemporary competition law and policy within Europe. It is a pleasure to introduce this important book which makes a significant contribution to this debate. Its publication could hardly be more timely. There is now an overwhelming scientific consensus that the environmental crisis threatens the very fabric of our societies and our economies. In 2019, a report authored by the world’s leading climate science organisations, including the Intergovernmental Panel on Climate Change and the UN Environmental Programme, *United in Science*, found that, without a sharp and urgent decline in greenhouse gas emissions, global warming will surpass 1.5°C, meaning irreversible ecosystem loss and human catastrophe.¹ At present, global greenhouse gas emissions are still growing.²

In the words of UN Secretary-General Guterres, climate change is “the defining challenge of our time”.³ Sector-specific responses to this will fail. Action must involve “all sectors of the society and the economy, including industry”.⁴

The European Green Deal, the European Commission’s flagship initiative declared by President Von der Leyen as a “European man on the moon moment”,

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1 Report to the UN Secretary-General’s Climate Action Summit: WMO, *United in Science* (WMO 2019) <www.ipcc.ch/2019/09/22/united-in-science-report-climate-summit/>.

2 *ibid.*

3 *ibid.*, 3.

4 European Parliament, Resolution declaring a climate and environmental emergency 2019/2930 (RSP) (28 November 2019).

has an all-economy approach at its heart. The role of private businesses and consumers in making investment, innovation and purchasing decisions is stated to be fundamental, as an essential complement to (although not a substitute for) legislation that will, if passed, be the most radical EU climate and environmental legislation ever seen.⁵ Reliance on state action alone will be insufficient. The European Climate Pact, launched by Vice-President Timmermans in December 2020 as a fundamental element of the European Green Deal, expressly seeks to promote the involvement of citizens, businesses and civil society in taking voluntary action in furtherance of the EU's climate goals.⁶ As the Commission states therein, the Green Deal can only succeed if “citizens, communities, companies and organisations play their part, alongside government policies and regulation”.⁷ As announced by President Von der Leyen, the aim is to “bring about a change of behaviour, from the individual to the largest multinational”.⁸

This acknowledgement of the crucial role of private business initiatives in achieving climate and environmental goals reflects the broader paradigm shift that has occurred in global environmental regulation in the past 20 years. Whereas traditional environmental regulation relied almost exclusively upon the state to fashion and enforce environmental rules, there is now consensus that private environmental initiatives form a crucial part of the policy mix.⁹ This is based on a profound realisation that it is no longer good enough to sit back and wait for the legislature to act to address environmental degradation. There are many environmental problems that the state cannot possibly address rapidly or effectively enough alone. Environmental problems do not respect jurisdictional borders, and are in many cases caused, and may most effectively be solved, by transnational economic actors.¹⁰ To take just one example, if Amazon fulfils its stated climate pledge to become net-zero carbon by 2040, based on current figures this would avoid emissions of at least¹¹ 51.17 million metric tonnes of carbon dioxide equivalent per annum, which equates approximately to the entire greenhouse gas emissions of Sweden in 2018.

5 Including the proposed European Climate Law which in its current form, as discussed below, contain a binding target for the EU to achieve carbon neutrality by 2050. The proposal is currently being considered by the European Parliament and the Council.

6 Commission, “European Climate Pact” (Communication) COM(2020) 788 final.

7 *ibid*, 1.

8 Ursula von der Leyen, “A Union that strives for more: Political Guidelines for the next European Commission 2019–2024” (2019) <https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf>.

9 This is reflected, for instance, in the UN Sustainable Development Goals, including UN SDG 12, addressing sustainable consumption and production patterns. See generally, Michael P Vandenbergh “Private Environmental Governance” (2013) 99(1) *Cornell L Rev* 129.

10 Based on Amazon's published 2019 figures. Sweden's greenhouse gas emissions in 2018 totalled 51.79 million metric tonnes of carbon dioxide equivalent: Amazon and OECD, “Statistical Dataset on National Greenhouse Gas Emissions: <www.aboutamazon.com/planet/climate-pledge> accessed 4 February 2021.

11 It is unclear whether this figure includes, for instance, greenhouse gas emissions from energy required to operate data centres, or emissions from Amazon's supply chain. See further Nives Dolsak and Aseem Prakash, “Amazon Pledges \$2 Billion Climate Fund, As Its Carbon Emissions Grow” (*Forbes*, 24 June 2020).

What role does competition law and policy have to play in this? The debate on the role of so-called “non-economic” policy factors in competition law is well known.¹² The Commission orthodoxy has, for almost 20 years, been that such factors must be excluded from competition analysis: the consumer welfare standard requires a narrow economic efficiency assessment entailing proof of quantified economic benefits for consumers within the relevant market.¹³

This is perhaps most evident in the Article 101 TFEU context, addressed in detail in Part I(1) of this volume.¹⁴ The 2004 guidelines on the application of Article 101(3) TFEU emphasise, for instance, that “objective economic efficiencies” are necessary for restrictive agreements to fall outside the Article 101(1) TFEU prohibition.¹⁵ The 2010 horizontal cooperation guidelines place similar emphasis on the need for the parties to an agreement to demonstrate objective economic efficiency gains in order to fall within Article 101(3) TFEU.¹⁶ They also make clear that benefits for consumers who fall outside the relevant market will not be relevant to the Article 101(3) TFEU assessment.¹⁷ Neither the Article 101(3) Guidelines nor the Horizontal Cooperation Guidelines expressly state that environmental benefits may in themselves satisfy constitute “technical or economic progress” within the meaning of the first condition of Article 101(3) TFEU. (By contrast, the previous (2001) horizontal cooperation guidelines expressly indicated that, where there were “net benefits in terms of reduced environmental pressure resulting from” a horizontal agreement, this would constitute technical/economic progress, whether the benefits were achieved “either at individual or at aggregate consumer level”.)¹⁸

Today, the suggestion that environmental benefits should be disregarded by competition authorities and courts appears, I would respectfully suggest, severely outdated.

First, it runs directly contrary to the European Green Deal and its all-economy approach to environmental protection, which demands “deeply transformative policies” underpinned by an economic model that properly values environmental

12 See for instance the discussion of Simon Holmes in this volume and see further, Suzanne Kingston, *Greening EU Competition Law and Policy* (CUP 2011), chapter 1; Christopher Townley, *Article 81 and Public Policy* (Hart 2009); and more recently Giorgio Monti. “Four options for a greener competition law” (2020) 11 (3–4) JECL & Pract 124–132.

13 For a defence of this approach, see, e.g., Luc Peeperkorn’s contribution to this volume.

14 See the contributions of Theo van Dijk, Maurits Dolmans, Ella van den Brink & Jordan Ellison, and Maarten Pieter Schinkel & Leonard Treuren.

15 Commission, “Guidelines on the application of Article 81(3) [now 101(3)] of the Treaty [2004] OJ C101/97 (Article 101(3) Guidelines), [59].

16 Commission, “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements” [2011] OJ C11/1 (Horizontal Cooperation Guidelines), [49].

17 *ibid* (“consumers’ encompasses the customers, potential and/or actual, of the parties to the agreement”). See similarly, Article 101(3) Guidelines (n 15), [84].

18 Commission, “Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements” [2001] OJ C3/2, [193].

and natural resources.¹⁹ As already noted, voluntary initiatives of business are expressly encouraged and acknowledged as playing a vital role in the EU's transformed, sustainable economic model. It would be a perverse outcome if the same businesses being encouraged by the European Green Deal effort to take pro-environmental initiatives were at the same time being *discouraged* from doing so by the chilling effect of potential competition enforcement.²⁰ As many of the contributions in this book note,²¹ competition policy must play its part – and at the very least must not contradict other Green Deal policy initiatives.

Second, such an isolationist approach to EU competition policy has no constitutional legitimacy within EU law. Excluding environmental considerations from competition assessments contravenes the Article 11 TFEU imperative to integrate environmental protection into all other EU policy areas.²² This is not just an abstract jurisprudential objection. It is fundamental to the rule of law that the Commission must act in accordance with the Treaties. DG COMP, or any other DG, has no administrative discretion to disapply part of the Treaties, whether for reasons of simplifying enforcement and the administrability of the competition rules, or otherwise.

Third, an isolationist approach assumes that environmental benefits cannot constitute economic efficiencies or be measured, which ignores the very significant developments in quantifying environmental goods in the discipline of environmental economics over the past 20 years.²³ Sustainability is, as van Dijk observes in this volume, “increasingly a dimension over which consumers compete with each other”. As Mark Carney argues forcefully in his 2020 Reith Lecture series, changes in society's environmental values in turn broaden the market's conceptions of value, thereby transforming moral into market sentiments.²⁴ This is borne out by the most recent public survey evidence in the EU, showing that 9 out of 10 Europeans see climate change as a serious problem and feel that protecting the environment is personally important to them.²⁵

19 Commission, “The European Green Deal” (Communication) COM(2019) 640 final, section 2.1.

20 It is settled case law that, pursuant to the *Ladbroke Racing* line of cases, undertakings remain subject to Article 101 TFEU if Member States (or the EU) merely encourage or make it easier for them to engage in autonomous anti-competitive conduct without mandating them by law to do so. See, e.g., Case C-280/08 P *Deutsche Telekom* EU:C:2010:603, [82]; Joined Cases C-359/95 P and C-379/95 P *Ladbroke Racing* EU:C:1997:531, [33]. See further, Kingston (n 12), chapter 11.

21 See for instance the contributions of Holmes, Dolmans and van Dijk.

22 See further Kingston (n 12), chapter 3 and Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (OUP 2016).

23 For an excellent overview, see Charles D Kolstad, *Environmental Economics* (2nd edn, OUP 2011); also Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press 2004).

24 Mark Carney, “How We Get What We Value: Reith Lectures 2020” (BBC Radio 4, December 2020) <www.bbc.co.uk/programmes/articles/43GjCh72bxWVSqSB84ZDJw0/reith-lectures-2020-how-we-get-what-we-value> accessed 4 February 2020.

25 Commission, “European Climate Pact” (Communication) COM(2020) 788 final, 1.

Integrating environmental considerations does not therefore require a fundamental rethink of the approach to policy factors in competition analysis. The consumer welfare standard is perfectly capable of accommodating environmental benefits. As van Dijk, Dolmans and van den Brink/Ellison discuss in this volume, methods of quantifying environmental benefits, such as assessment of consumers' willingness-to-pay for improved environmental quality, are now well established in the discipline of environmental economics. As Delarue and Walker comment, from an economic perspective there is "nothing conceptually difficult about also believing that things such as sustainable production, decarbonisation, reducing environmental degradation and so on should also be included in a consumer welfare standard." While arguments may be had about how they should best apply in a specific case, this is true for many fields of competition economics.

It can hardly be denied that applying such valuation techniques goes beyond competition economists' traditional comfort zone. Yet the climate emergency requires innovation from competition authorities no less than the rest of society. Such innovation may extend, as noted in van Dijk's contribution for instance, to valuing out-of-market benefits. As highlighted by Kar, Cochrane and Spring, and Iacovides and Vrettos, there are also forceful arguments for applying such valuation techniques to, for instance, valuation of efficiencies in merger analysis,²⁶ and assessing objective justification under Article 102 TFEU.²⁷

Of course, this does not mean that environmental protection aims should be used as a pretext for collusion or "greenwashing", a risk rightly emphasised in Schinkel and Treuren's chapter.²⁸ A case-by-case approach will be required. But in cases of genuine green private initiatives with objective environmental benefits, where there is no less restrictive means of achieving those benefits, coordinated approaches should not be prohibited. The argument should no longer be about whether such benefits can be considered, but *how* they should be considered. This volume makes an important contribution to that discussion.

Of immense value here are the insights from specific business sectors addressed in Part II, which go beyond the legal and economic framework to explain precisely how sustainable competition policy might impact key economic sectors. As Jérôme Cloarec, head of antitrust at Michelin, puts it, "without legal certainty for the industry, sustainability might remain half-baked". The need for clearer guidance to remove the chilling effect of potential competition enforcement is a vivid and consistent message across the contributions from the automotive, consumer goods, food supply and banking sectors.²⁹

26 See the contribution of Kar, Cochrane and Spring in this volume.

27 See the contribution of Iacovides and Vrettos in this volume.

28 The avid concern to avoid greenwashing is, of course, not specific to competition policy, and indeed is one of the three core values of the European Climate Pact announced in December 2020 (n 25), 8.

29 See the contributions of de Brousse, Chu, Cloarec, Rose, Linke & Woll, Gayk, Graham, Ferrando & Lombardi, Meagher & Roberts, Bredt and Mullan, Braithwaite & Cheetham-West.

With the exceptions of state aid, where the Commission has had clear guidelines on environmental aid since 1994,³⁰ it is Member States that are leading the way on this issue. Among the first-movers was the Dutch Autoriteit Consument & Markt (*Chicken of Tomorrow*; *Coal Plant Closure*); as discussed by Snoep in this volume, the Dutch authority published innovative draft guidelines on sustainability in July 2020, and a revised version in January 2021.³¹ In Germany, the Bundeskartellamt has indicated that it is prepared to constructively support pioneering environmentally motivated projects: its approach to the *Initiative Tierwohl* is a case in point.³² The French Autorité de la concurrence has also been active in the field, considering environmental issues in imposing commitments (*Nespresso*, *Engie*); as discussed by de Silva, in May 2020 it published a working paper on the climate emergency. And beyond the EU, the UK Competition and Market Authority’s “Annual Plan 2020 to 2021” commits to developing its understanding of how it can support the transition to a low-carbon economy.³³

Just as other areas of law are being forced to recognise the scale of the climate emergency – such as human rights law in the wake of the Dutch Supreme Court’s *Urgenda* decision³⁴ – it is now the time for competition law to do so. Competition authorities should send a clear signal to industry that competition policy will not stand in the way of genuine and proportionate pro-environmental initiatives. Policy leadership is required. The current guidance vacuum at EU level should be filled as a matter of urgency. Indeed, if the proposed European Climate Law comes into force, it is arguable that the European Commission will have a legal *duty* to produce such guidance. See Article 5(3) of the Proposal, which obliges the Commission to take the “necessary measures” to ensure that the legally binding objective of climate neutrality in the Union is attained by 2050, and to eliminate inconsistent Union measures.³⁵

A good place to start would be the forthcoming horizontal cooperation guidelines, which are presently under review. Beyond this, clear and consistent guidance is also needed on Article 102 TFEU and mergers. Encouragingly, the Commission is actively considering how the competition rules and sustainability policies work

30 See the contributions of Webber and Robins in this volume, and Kingston (n 12), chapter 12.

31 ACM, “Draft Guidelines: Sustainability Agreements, Opportunities within competition law (9 July 2020, last updated on 26 January 2021) <www.acm.nl/en/publications/draft-guidelines-sustainability-agreements>.

32 For a summary in English, see Bundeskartellamt, “Bundeskartellamt calls for more consumer transparency in animal welfare initiative” Press release (28 September 2017).

33 CMA, “Annual Plan 2020 to 2021” (19 March 2020) <www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2020-to-2021/annual-plan-2020-to-2021>.

34 *Netherlands v Stichting Urgenda* Judgment of the *Hoge Raad* (Supreme Court) 20 December 2019 NL:HR:2019:2006. See also, the Decision of the Administrative Tribunal of Paris of 3 February 2021 in *Association Oxfam France, Association Notre Affaire à Tous, Fondation pour la Nature et l’Homme & Association Greenpeace France v République Française* (n° 1904967, 1904968, 1904972, 1904976/4-1).

35 Proposal for a Regulation establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM(2020) 80 final.

together, as witnessed by its consultation on the matter which, at the time of writing, is ongoing. Within agriculture, for instance, the Commission's May 2020 "Farm to Fork Strategy", part of the Green Deal package, indicates that the competition rules are to be clarified for "collective initiatives that promote sustainability in supply chains".³⁶ Within state aid, the guidelines on environmental protection and energy³⁷ are also currently under review. The elephant in the room is that state aid for the fossil fuel industry remains, on the current guidelines, compatible with EU law.³⁸ Politically, as hot potatoes go, this is undoubtedly a scorcher.³⁹ On any objective scientific basis, however, this state of affairs appears impossible to justify.

Whatever view one espouses on these issues, it is clear that the role of environmental considerations within economic policies, including competition policy, is perhaps the most critical challenge facing Europe today. The editors are to be commended for their innovative contribution to this vital debate.

36 Commission, "A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system" (Communication) COM(2020) 381 final, section 2.1.

37 Commission, "Guidelines on State aid for environmental protection and energy 2014–2020" [2014] OJ C200/1.

38 The 2014 guidelines expressly do not address the issue of aid to the fossil fuel industry. See the discussion of Nicole Robins in this volume.

39 The issue of aid to the fossil fuel industry has been addressed on multiple occasions by the European Council, which has for some years now committed to the gradual phasing out of such subsidies (see, for instance, European Council Conclusions from 23 May 2013). Regulation 2018/1999/EU on the Governance of the Energy Union and Climate Action [2018] OJ L328/1 requires the Commission to report each year on Member States' progress towards phasing out fossil fuel subsidies. The Commission's most recent report of October 2020 (COM(2020) 950 final) shows that in fact Member State fossil fuel subsidies are still, astonishingly, gradually *increasing* overall (at 1). Overall, fossil fuel subsidies within the EU amounted to €50 billion in 2018.

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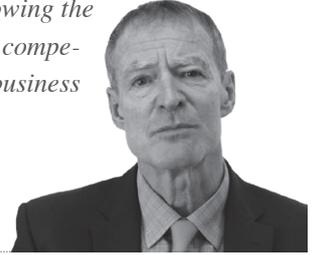


Introduction by Suzanne Kingston
Foreword by Frans Timmermans

Simon Holmes

” This is the most important book ever! Ok, so I exaggerate a bit. Climate change is, however, the most important issue facing humanity and this book aims to make a small contribution to the fight against climate change by showing the role that competition law can play. In particular, it shows how competition law need not stand in the way of vital cooperation by business to put our economy on a more sustainable footing. “

Judge, UK Competition Appeal Tribunal
Visiting Professor, Oxford University



Dirk Middelschulte

” Sustainability and competition law has (re-)emerged as a hot antitrust policy topic. But only a few companies, sector regulators, NGOs and academics have shared industry-specific perspectives. This volume tries to fill this gap and add a more holistic view. It unites a diverse range of authors that explore if competition law and enforcement provide the right framework for business delivery on the EU Green Deal and the UN SDGs. “

Global General Counsel Competition, Unilever



Martijn Snoep

” Competition lawyers and economists around the world, regardless of whether they are working in the private or public sector, should consider what they can do to help to prevent a global climate crisis. Our children and our children’s children will look back at us many years from now, asking themselves what we did to create their living conditions. The authors of this book provide inspiration by showing the global competition community a way forward. This is the time to do what’s right for future generations. This book gives a comprehensive, complete and very clearly written overview of this complex issue. “

Chairman, Netherlands Authority for Consumers and Markets (ACM)



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